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To: The Commission

OPPOSITION TO APPLICATION FOR REVIEW

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OPPOSITION TO APPLICATION FOR REVIEW

The Radio Ministries Board of Victory Christian Center Assembly of God, Inc. ("Radio Board"), by counsel, hereby opposes the Application For Review filed November 6, 1992 by Crystal Clear Communications, Inc. ("Crystal") seeking reversal of the Review Board's Memorandum Opinion and Order, FCC 92R-79 (released October 7, 1992) ("Decision"), affirming dismissal of Crystal's application. In opposition, the following is stated:

A. Preliminary Statement

Crystal's application was designated for hearing with that of Radio Board in Hearing Designation Order, 7 FCC Rcd 2294 (released April 13, 1992) ("HDO"). Paragraph 12 of the HDO directed that the applicants "shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order file with the Commission" a written notice of appearance ("Notice"). Crystal was therefore required to file a post-designation Notice by no later than May 4, 1992. Section 1.221 of the rules provides that if the applicant fails, without a showing of good cause, to timely file its Notice, its application "will be dismissed with prejudice for failure to prosecute." (Emphasis added.) Thus, when Crystal had not filed its Notice with the Commission by May 11, 1992, Radio Board moved to dismiss Crystal's application.

On May 18, 1992, Crystal filed a "Report" maintaining it had retained a courier on May 4, 1992 to deliver its Notice to the Commission by 5:30 p.m. that day, but had discovered, on May 16, that its Notice was not delivered. Crystal's Report, which concluded "additional information is being sought by Crystal as to this matter," did not identify the courier nor include any documentation to corroborate its story. On May 26, 1992, Crystal filed a motion for acceptance of its late-filed Notice, providing no new information, still keeping the courier's identity undisclosed, and again failing to include any documentation.

In the meantime, Crystal's integration statement was due to be filed by May 11, 1992. While the certificate of service on Crystal's integration statement was dated May 11, 1992, Radio Board later discovered that statement was also filed late, on May 12, 1992. Further, although required by the HDO and Section 1.325(c) of the rules to exchange documents by May 11, 1992, Crystal also failed to comply with that requirement. Both derelictions were pointed out in Radio Board's June 4, 1992 pleadings opposing Crystal's motion for acceptance of its Notice and responding to Crystal's opposition to the dismissal motion.

On June 11, 1992 Administrative Law Judge ("ALJ") Frysiak dismissed Crystal's application through Memorandum Opinion and Order, FCC 92M-657 ("MO&O").^{1/} The ALJ found Crystal's failure to timely file its Notice and to provide adequate justification for that failure required its dismissal, noting Crystal had failed even to identify the courier allegedly relied upon or to submit any documentation to corroborate its excuse for late filing.

Pursuant to Section 1.301(a)(1) of the Commission's Rules, any appeal of Crystal's dismissal was due June 18, 1992. Four days after that deadline, on June 22, 1992, Crystal filed a Notice of Appeal through new counsel, the law firm of McFadden, Evans & Sill. The next day, Crystal's original attorney, Stanley Emert, also filed a notice of appeal. Neither notice of appeal was a substantive pleading, as required by Section 1.301(a). Therefore, on June 29, 1992 Radio Board filed with the Review Board a motion to dismiss Crystal's untimely and procedurally deficient notices of appeal. On July 1, 1992, Crystal requested leave to file its appeal late, a request Radio Board opposed. On July 8, 1992, 20 days after the filing deadline for an appeal, and before the Review Board acted on its request

^{1/} Radio Board's application was granted July 22, 1992. See Summary Decision of Administrative Law Judge John M. Frysiak, FCC 92D-50 (released July 22, 1992).

to allow a late appeal, Crystal filed its substantive Appeal "to eliminate any further delay or prejudice" from its untimeliness.^{2/}

On October 7, 1992 the Review Board released its Decision which, without addressing the lateness of Crystal's Appeal, affirmed dismissal of Crystal's application. In doing so, the Review Board incorporated by reference its reasoning for dismissing the application of Zenitram Communications, Inc. ("Zenitram"), in a simultaneously issued Memorandum Opinion and Order in LRB Broadcasting, FCC 92R-78. Zenitram also was initially represented by Mr. Emert and later by McFadden, Evans & Sill, and was dismissed on facts virtually identical to those here.^{3/} On November 6, 1992 Crystal filed its Application for Review, but since Radio Board did not receive it until November 17, 1992 (the pleading was not correctly addressed), the Commission extended the deadline for filing this opposition to December 3, 1992. Order, FCC 92I-090 (released November 19, 1992).

B. Argument

The Review Board Correctly Concluded That The Facts Here Warrant Crystal's Dismissal

Courier Non-Delivery of Notice. Crystal has never identified the errant courier nor provided any documentation whatsoever upon which to base its showing of "good cause" for accepting its late-filed Notice. Thus, Crystal's contention, in its Application for Review, that its justification for that late filing is "unchallenged" is ludicrous; Radio Board could hardly "challenge" a story which does not even identify

^{2/} See Crystal Appeal, p. 1, note 1. That representation apparently responded to Radio Board's argument that by filing its appeal late, Crystal had eliminated any chance the scheduled hearing date could have been met (if Crystal's application were reinstated), to the potential prejudice of Radio Board, the Seelyville public awaiting a new FM service, and the integrity of the Commission's processes.

^{3/} Crystal maintains that the Review Board incorrectly treated the facts here as factually identical to LRB, claiming this case involves only "a single isolated instance of a late filing." Application for Review, p. 2, Note 1. In fact, this case involves the same derelictions as LRB: a late filed Notice and integration statement, and a failure to produce documents.

the lead character, the wayward courier. Crystal's failure to corroborate its excuse for the late filing of its Notice, in itself, is a solid basis upon which to reject its Notice and dismiss its application, as the ALJ properly concluded.^{4/} See e.g., Silver Springs Communications, 3 FCC Rcd 5049 (Rev. Bd. 1988), rev. denied, 4 FCC Rcd 4917 (1989) (no good cause shown where applicant asserts it did not receive HDO, thereby defaulting on Notice and filing fee, but does not document assertion);^{5/} Juan Galiano, 5 FCC Rcd 6442 (1990) (unsupported excuse for late filing rejected), recon. denied, 6 FCC Rcd 895 (1991).

Further, even if Crystal had supported its negligent courier story, it would not have justified its late filing, since the Commission has warned applicants not to rely upon couriers for delivery of time-sensitive filings, noting applicants waiting until the eleventh hour to meet Commission deadlines must assume the risk for almost all events which may prevent timely filing. See Public Notice, supra. The

^{4/} An applicant also must show that, after untimely delivery, all reasonable steps were taken to minimize further delay. Public Notice (Overruling of Caldwell Television Associates), 58 RR 2d 1706, 1707 (1985) ("Public Notice"). Crystal's claim it did not learn of the nondelivery of its Notice until May 16, 1992, is unsupported. And if the story is true, it means that although Crystal asked for a stamped-in copy of its Notice, when no such copy was forthcoming during the two weeks after the Notice was due, Crystal did not check on delivery. Moreover, Crystal then waited another ten days, until May 26, to move for acceptance of its late Notice.

^{5/} Crystal also argues that because it paid its hearing fee with a document titled "Notice of Appearance" on July 15, 1991, its failure to timely file a post-designation Notice is a "minor technicality." But Crystal's fee was only "on deposit" with the FCC, since failure to timely file a post-designation Notice allows an applicant to obtain a refund of the fee. See Section 1.1111(c)(2). Crystal's July 15 "Notice" did not toll that opportunity for a refund because it was legally irrelevant: Crystal could not affirm any intent to meet issues and appear on the date for hearing when neither the HDO specifying the issues nor the prehearing order setting the hearing date had been adopted. Moreover, under §1.221(c), the Notice must be "filed with the Commission." Thus, even after serving copies on the ALJ and the other parties, Crystal could have sought a refund. Further, as the Review Board detailed in LRB, ¶ 13, the filing of a Notice after hearing designation is important under the reform procedures adopted by the Commission in 1990. See Proposals to Reform Comparative Hearing Process, 5 FCC Rcd 157 (1990), modified on reconsideration, 6 FCC Rcd 3401 (1991) ("Hearing Reforms").

strict standard set forth in the Public Notice is not limited to the cut-off date for the initial filing of an application, as Crystal maintains. See e.g., Kennebec Valley Television, Inc., 65 RR 2d 149 (1988) (denying consideration of untimely "decisive" B cut-off amendment, noting delays by couriers do not justify waiver of filing deadline).^{9/}

Attorney NonFeasance. Although, upon appeal, Crystal suggests its lack of diligence was the fault of its prior counsel, as the Review Board notes, "no factual documentation has been offered for its new theory of attorney inattention" LRB, supra at ¶ 10. Thus, it is not the Review Board but Crystal, which proffered its attorney nonfeasance excuse with neither details nor factual support, which has acted "in a cavalier fashion." Further, even if documented, attorney inattention would not absolve Crystal's late filing. The Commission has warned applicants to choose counsel with care, since they will suffer the consequences if counsel does not rigorously prosecute their applications. Albert E. Gary, 4 FCC Rcd 4112, 4113, n. 1. (Rev. Bd. 1989). See also, Carroll, Carroll and Rowland, 4 FCC Rcd 7149, 7151 (Rev. Bd. 1989) (applicants not immunized against sanctions merely because they rely on counsel; otherwise administrative and procedural havoc would ensue), rev. denied, 5 FCC Rcd 2430 (1990).

Crystal maintains such cases are distinguishable because there was no "pattern" of misconduct here and it diligently secured new counsel. But the late filing of its Notice was not an isolated transgression: Crystal's integration statement also was late filed, and it did not produce documents. Moreover, Crystal did not immediately secure new counsel. It was on notice by mid-May 1992 that its Notice had been filed late since Radio Board's dismissal motion -- sent not only to Crystal's counsel, but also to Crystal's president -- was filed May 11, 1992. If its attorney's "inattention" had caused the late filing

^{9/} Although the Review Board found it unnecessary to decide whether the Public Notice governs here, since Crystal's dismissal also is warranted under guidelines set forth in Communi-Centre Broadcasting, Inc., v. FCC, 856 F. 2d 1551 [65 RR 2d 457] (D.C. Cir. 1988), it did note that the Public Notice's emphasis on strict deadlines tracks with the Commission's recent Hearing Reforms setting forth strict deadlines and criticizing delays.

of its Notice, Crystal should then have secured new counsel. Moreover, although Radio Board's June 4 reply pleading documented Crystal's failures to timely file its integration statement and to exchange documents, still Crystal did not retain new counsel, but waited until June 22, ten days after its application was dismissed and several days after the deadline for appealing that dismissal.

Crystal erroneously relies upon Maricopa County Community College District, 4 FCC Rcd 7754 (Rev. Bd. 1989), to support its theory that its application may not be dismissed because its tardy filings were due to attorney "inattention." Maricopa involved an attorney who did not timely file hearing exhibits because, he said, he planned to kill himself. The applicant, which hired new counsel within four business days, was not allowed to respond in writing to a motion to dismiss. The Review Board reinstated the application, noting the applicant should have been allowed to respond formally to the dismissal motion, it had previously diligently prosecuted its application, it had promptly retained new counsel, and there was not a pattern of dilatory conduct. Here, in contrast, Crystal's dilatory actions began with its first filing after the HDO was issued and continued with other late filings; it did not diligently secure new counsel; and it has had ample opportunity to respond to the motion for dismissal of its application, and to document its justification for late filing.

The Review Board correctly concluded that whether the courier, counsel, or the applicant were at fault, Silver Springs, the 1985 Public Notice, and the Commission's admonition in Hillebrand Broadcasting, Inc.^{7/} that applicants' temporizing activities would not be indulged, all support Crystal's dismissal.^{8/}

^{7/} 1 FCC Rcd 419 (1986).

^{8/} Further, the Review Board also should have dismissed Crystal's Appeal as untimely. See SBM Communications, Inc., 7 FCC Rcd 3436, ¶ 2 (1990).

Communi-Centre Supports Dismissal. Assuming, as Crystal maintains, the correct standard is not the Commission's 1985 Public Notice and its progeny but Communi-Centre, Crystal's dismissal nevertheless must be upheld. In Communi-Centre, the court suggested four factors to be considered -- even when all four are not present -- in reviewing dismissal.^{9/} First is the justification for noncompliance. As discussed above, Crystal has failed to document either of its alternative excuses for filing its Notice late and, even if it had, Commission caselaw supports the conclusion that neither excuse justifies its untimely filing. Further, there is a pattern of dilatory conduct here.

Other factors are whether there is any prejudice, any "burden" on the administrative system, or a need to deter future misconduct. As the Review Board noted in LRB, ¶¶ 11-12, 14, Crystal's failure to produce documents and timely file an integration statement^{10/} frustrated efforts to complete discovery and prepare for hearing, prejudicing Radio Board's discovery rights and potentially delaying the ALJ's effort to resolve the case within the time period established by the Commission's reform procedures. That delay also prejudices the Seelyville public awaiting new FM service.

Further, an applicant's failure to abide by the Commission's rules eviscerates those rules and promotes gamesmanship, at great expense to the public interest. That fact and the other circumstances here, including Crystal's repeated transgressions, demonstrate a gross disregard for the Commission's processes which must be deterred.^{11/}

^{9/} The Court said that "among the factors appropriate for consideration" are the four discussed herein. 65 RR 2d at 459. It did not hold that all four factors must be present.

^{10/} The fact the ALJ did not discuss these further failures (having concluded the untimeliness of the filing of Crystal's Notice, without more, was sufficient to warrant dismissal) is legally insignificant since Radio Board timely raised them and the Review Board properly analyzed them.

^{11/} Crystal urges reinstatement in order to allow a "choice" between two applicants. But maintaining a "choice" cannot be at the expense of the integrity of the Commission's processes and its longstanding policy of rejecting vague, unsupported excuses for ignoring Commission deadlines. Furthermore, Radio
(continued...)

Crystal's situation is unlike the applicant in Horizon Community Broadcasters, Ltd., 102 FCC 2d 1267 (Rev. Bd. 1982), which filed its proposed findings four workdays late when the disc upon which those findings had been typed was erased just before filing. The ALJ dismissed the application without allowing the applicant to explain; and the Review Board reinstated it. Here, in contrast, Crystal relied upon the guarantee of a courier service, despite Commission warnings that such reliance is risky and it has had a chance to justify its late-filing. Moreover, Nancy Naleszkiewicz, 7 FCC Rcd 1797 (1992), is not on point. As the Commission specifically noted, it was not a comparative case subject to the stricter standards applicable to the comparative process.^{12/}

Effective and expeditious dispatch of the FCC's responsibility to provide new service to the public is, in itself, an integral part of the public interest. Thus, as the Review Board noted, in LRB, ¶ 2, the

^{11/}(...continued)

Board, on May 12, 1992, filed a motion to enlarge issues seeking site availability and misrepresentation issues against Crystal in its May 28, 1992 opposition to Radio Board's enlargement motion, Crystal admitted that its proposed transmitter site was not available (it had been sold about a year earlier) and that Crystal was searching for a new site. Thus, in addition to lacking any comparative attributes (since its integration statement was not timely filed), as of the time its application was dismissed Crystal was not even basically qualified to hold a construction permit.

^{12/} The facts here also bear no resemblance to those in John Spencer Robinson, 5 FCC Rcd 5542 (Rev. Bd. 1990), where an applicant filed its post-designation notice before the deadline, but misunderstood instructions from the FCC as to rules on new filing fees. Likewise, St. Croix Wireless Co., 3 FCC Rcd 4073 (1988), recon. denied, 5 FCC Rcd 4564 (1990) involved confusion over when a Notice must be filed after there had been an agreement as to universal settlement. Because of that universal settlement and termination of the proceeding, acceptance of the late Notice to allow one of the settling applicants to take part in the settlement did not prejudice the parties or the public. Nor does Cannon Communications Corp., 6 FCC Rcd 570 (1991), recon. denied, 6 FCC Rcd 3310 (1991) support Crystal's position. There an applicant failed only to timely file a Section 1.65 amendment. The competing applicant did not even raise the matter before the ALJ. The applicant maintained that the failure to timely amend was inadvertent.

As the Board noted in LRB, ¶ 14, Pan American Broadcasting Co., 89 FCC 2d 167 (Rev. Bd. 1992), a Review Board decision also cited by Crystal, was decided a decade ago and has been tempered by subsequent Commission decisions, including Hillebrand, supra. See also the Review Board's discussion of Pan American in Opportunity Broadcasting of Shreveport, 6 FCC Rcd 5018, 5019 (Rev. Bd. 1991), rev. denied, 7 FCC Rcd 1384 (1992).

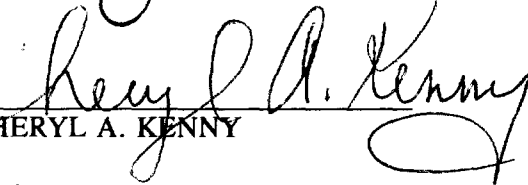
Commission now gives greater emphasis to the ALJ's discretion to determine appropriate procedures and remedies to ensure such service to the public. And applicants have a high burden to justify exception to procedural deadlines. CSJ Investments, Inc., 5 FCC Rcd 7653, 7654 (1990); Hearing Reforms, *supra* (undue delay in selecting applicants disserves the public by delaying new service and exacting economic toll on government, taxpayers and applicants).

In light of the facts here, the Review Board correctly held that the ALJ did not abuse his discretion in dismissing Crystal's application. Therefore, Crystal's Application for Review should be DENIED.

Respectfully submitted,

THE RADIO MINISTRIES BOARD
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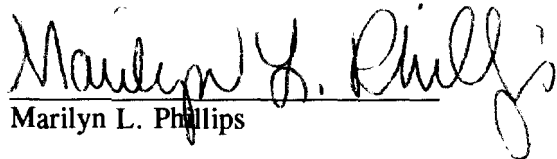
December 3, 1992

CERTIFICATE OF SERVICE

I, Marilyn L. Phillips, a secretary in the law firm of Reddy, Begley & Martin, hereby certify that on this 3rd day of December, 1992, copies of the foregoing **Opposition to Application for Review** were hand delivered or mailed, first class, postage prepaid, to the following:

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